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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

JILL ISHKANIAN et al., Plaintiffs and Respondents, v. KEN BAKER et al., Defendants and Appellants.	B204901 (Los Angeles County Super. Ct. No. BC377578)

APPEAL from an order of the Superior Court of Los Angeles County. Mel Red Recana, Judge. Reversed and remanded with directions.

Davis Wright Tremaine, Alonzo Wickers IV and Robyn Aronson for Defendants and Appellants.

Tepper Law Firm and Nicholas Tepper for Plaintiffs and Respondents.

* * * * * *

Defendants and appellants Ken Baker, Jann Wenner, Janice Min and Wenner Media LLC (sometimes collectively appellants) appeal from an order denying their special motion to strike a complaint filed by plaintiffs and respondents Jill Ishkanian (Ishkanian) and Sunset Photo and News (Sunset Photo). The trial court ruled that appellants met their threshold burden to show that the complaint's allegations arose from protected activity within the scope of Code of Civil Procedure section 425.16,[1] but that Ishkanian and Sunset Photo thereafter met their burden to establish a probability of prevailing on the basis of the allegations in their verified complaint.

We reverse. Although the trial court properly concluded that the complaint arose from protected activity, it erred in concluding that Ishkanian and Sunset Photo could and did meet their burden to show a probability of prevailing in the absence of offering any supporting evidence.

FACTUAL AND PROCEDURAL BACKGROUND

The following allegations and facts are taken from the complaint and the evidence appellants submitted in connection with the motion to strike.

US Weekly magazine, a publication owned by Jann Wenner (Wenner) and Wenner Media LLC (Wenner Media), hired Ishkanian as a reporter in July 2002. At that time, Ken Baker (Baker) was the magazine's west coast bureau chief editor. During the next two years, Ishkanian and Baker had disagreements about Baker's methods of obtaining information about celebrities, Baker's failing to accord attribution for stories obtained by Ishkanian and US Weekly editors using their positions for personal gain. Ishkanian also confronted Baker about his inappropriate behavior toward female employees. Sometime in 2003, Wenner also confronted Baker about his laxity with building security. At about the same time, Baker initiated a policy whereby he provided

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[1] Unless otherwise indicated, all further statutory references are to the Code of Civil Procedure.

a computer password for US Weekly's reporting box not only to staff members but also to interns and freelance reporters and photographers.

Ishkanian resigned from US Weekly in October 2005. She did not renew her employment contract; instead, on July 22, 2005 she had signed an agreement making her an at-will employee. She began working for Sunset Photo, which provided news reports and photographs to US Weekly and its competitors. Nonetheless, through the end of 2005, Ishkanian's US Weekly voicemail and cell phone remained active. In early 2006, however, Sunset Photo and US Weekly ceased doing business together as a result of US Weekly publishing a story that did not accord credit to Sunset Photo.

In February 2006, appellants conducted an internal investigation of Ishkanian's activities following her departure from US Weekly on the basis of a belief that she had accessed and intercepted password-protected confidential e-mails between the magazine's reporters and editors, and used that information to interview and photograph the subjects of those e-mails. After changing an individual reporter's e-mail password, appellants learned that a Sunset Photo computer repeatedly and unsuccessfully attempted to access that reporter's e-mail. They reported their findings to the Los Angeles office of the Federal Bureau of Investigation (FBI) at the end of February 2006, at which time the FBI commenced its own investigation. According to Ishkanian, appellants' reports to the FBI were false, as US Weekly was voluntarily providing her with confidential information including computer passwords and access codes. This was consistent with US Weekly's policy of providing computer access to other third parties.

In May 2006, the FBI entered and searched Ishkanian's home and the Sunset Photo offices pursuant to a search warrant. FBI agents entered Ishkanian's home at 6:00 a.m. and handcuffed Ishkanian and her boyfriend during the search. During the search of Ishkanian's home and office, FBI agents removed computer hard drives and personal and business records. Following the FBI searches, Ishkanian had difficulty eating and sleeping for two weeks, she was unable to return to work for six months, and in September 2006 a doctor diagnosed her as suffering from post-traumatic stress syndrome stemming from the FBI searches. During this time, the Los Angeles Times and

other media outlets reported the FBI searches and the allegations against Ishkanian and Sunset Photo. Appellants allegedly provided information about the searches to various media sources. Despite this, Ishkanian alleged that she continued to receive confidential information from US Weekly through April 2007.

Ishkanian and Sunset Photo filed a verified complaint against appellants in September 2007, alleging causes of action for intentional infliction of emotional distress, negligent infliction of emotional distress, negligence, negligent training and retention, breach of contract, breach of the implied covenant of good faith and fair dealing, slander, libel, intentional interference with prospective economic advantage and civil conspiracy. They alleged that previous disputes between appellants and Ishkanian and Sunset Photo had motivated appellants to develop a policy and scheme to destroy Ishkanian and Sunset Photo. They further alleged that appellants carried out this policy and scheme by contacting Ishkanian's news sources to persuade them to provide information to US Weekly and not Sunset Photo; by telling numerous individuals that Sunset Photo would fail; by instigating and causing the FBI searches; and by providing information to media outlets about the FBI searches. They sought general, special and punitive damages.

In October 2007, appellants filed a special motion to strike eight causes of action pursuant to section 425.16, together with a demurrer and a motion to stay the two contract causes of action on the basis of a forum selection clause in Ishkanian's employment agreement. In support of the motion to strike, appellants submitted a declaration from Tim Walsh, a Wenner Media vice-president, who outlined Wenner Media's investigation of Ishkanian and the results thereof, which caused Wenner Media to report its findings to the FBI's Los Angeles office in February 2006. They also submitted a declaration of counsel, who stated he had spoken with federal authorities who informed him that by October 2007 the FBI had completed its investigation of Ishkanian and Sunset Photo, and had referred the matter to the Cyber and Intellectual Property Crimes section of the United States Attorney's Office in Los Angeles.

In November 2007, Ishkanian and Sunset Photo filed an ex parte application seeking to continue the hearing on the motion to strike in order "to conduct discovery to

marshal evidence required to defend" the motion. The trial court denied the motion, finding no good cause to allow Ishkanian and Sunset Photo to conduct the requested discovery. Thereafter, they filed their opposition to the motion to strike and to the motion to stay, unsupported by declarations or other evidence.

Without hearing any argument on the motions, the trial court issued an order on December 17, 2007, granting the motion to stay the fifth and sixth causes of action and denying the motion to strike. The trial court determined that appellants met their burden of establishing the complaint contained causes of action arising from acts in furtherance of their right of petition or free speech. After explaining that appellants' showing shifted the burden to Ishkanian and Sunset Photo to establish a probability of prevailing, the trial court noted that "neither party has submitted any affidavits for the Court to consider. Thus, the pleading (*verified* Complaint) is the only document left for the Court to consider." Accordingly, the trial court ruled: "Based on the *verified* pleading, and particularly PAR 112, 147 & 148, it appears to the Court that the Plaintiff has established a probability of prevailing on the claims: the Complaint is legally sufficient and supported by a prima facie showing of facts sufficient to support a favorable judgment if the evidence submitted by plaintiff is credited." The trial court further concluded that the affirmative defenses raised by appellants were insufficient to overcome the prima facie showing.

This appeal followed.

DISCUSSION

Appellants challenge the denial of their motion to strike. They focus on the second prong of the trial court's order and argue that the trial court erred in relying on the allegations of the complaint alone to determine that Ishkanian and Sunset Photo established a probability of prevailing and, alternatively, that their affirmative defenses were adequate to overcome any showing. Implicitly conceding the trial court's error in relying solely on the complaint's allegations, Ishkanian and Sunset Photo completely ignore the second prong of the trial court's ruling and instead assert that the order should

be upheld because appellants failed to meet their burden to show the complaint alleged protected activity under section 425.16. We cannot affirm the order on that basis. Rather, the motion to strike should have been granted, as the complaint arose from conduct protected by section 425.16, and Ishkanian and Sunset Photo failed to establish a probability of prevailing.

I. General Principles Governing Special Motions to Strike.

A special motion to strike may be filed in response to a SLAPP[2] suit, which is "'a meritless suit filed primarily to chill the defendant's exercise of First Amendment rights.' [Citation.]" (*Dove Audio, Inc. v. Rosenfeld, Meyer & Susman* (1996) 47 Cal.App.4th 777, 783 (*Dove Audio*).) Section 425.16 provides a summary procedure for disposing of SLAPP suits, stating in relevant part: "A cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States or California Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim." (§ 425.16, subd. (b)(1).) Pertinent here, the statute defines an "'act in furtherance of a person's right of petition or free speech'" as used in subdivision (b)(1) to include: "(1) any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law; (2) any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law; (3) any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest; (4) or any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest." (§ 425.16,

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[2] SLAPP stands for Strategic Lawsuit Against Public Participation. (*Jarrow Formulas, Inc. v. LaMarche* (2003) 31 Cal.4th 728, 732, fn. 1.)

subd. (e).) To ensure protection of the constitutional rights of petition and free speech, the statute is to be construed broadly. (§ 425.16, subd. (a); *Kibler v. Northern Inyo County Local Hospital Dist.* (2006) 39 Cal.4th 192, 199; *Briggs v. Eden Council for Hope & Opportunity* (1999) 19 Cal.4th 1106, 1119–1120.)

When a special motion to strike is filed, the trial court must engage in a two-step process. "First, the court decides whether the defendant has made a threshold showing that the challenged cause of action is one arising from protected activity. The moving defendant's burden is to demonstrate that the act or acts of which the plaintiff complains were taken 'in furtherance of the [defendant]'s right of petition or free speech under the United States or California Constitution in connection with a public issue,' as defined in the statute. [Citation.]" (*Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 67; accord, *Rusheen v. Cohen* (2006) 37 Cal.4th 1048, 1056.) A defendant who meets the burden of showing a cause of action arises out of the exercise of the rights of petition or free speech has no additional burden of proving either the plaintiff's subjective intent to chill or a chilling effect. (*City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 74–76; *Equilon Enterprises v. Consumer Cause, Inc., supra,* at pp. 58–67.)

Second, once the defendant establishes the complaint's claims arise out of the exercise of petition or free expression rights, the burden shifts to the plaintiff to establish a probability that he or she will prevail on the merits. (§ 425.16, subd. (b)(1); *Rusheen v. Cohen, supra,* 37 Cal.4th at p. 1056; *Briggs v. Eden Council for Hope & Opportunity, supra,* 19 Cal.4th at p. 1115.) To satisfy this burden, "the plaintiff must 'state[] and substantiate[] a legally sufficient claim.' [Citation.]" (*Jarrow Formulas, Inc. v. LaMarche, supra,* 31 Cal.4th at p. 741.) The plaintiff therefore must make a prima facie showing of facts that would, if proven, support a judgment in his or her favor. (*Wilson v. Parker, Covert & Chidester* (2002) 28 Cal.4th 811, 821.) For purposes of this inquiry, "the trial court considers the pleadings and evidentiary submissions of both the plaintiff and the defendant [citation]." (*Ibid*.) But "'the court does not weigh the evidence or make credibility determinations. [Citations.]'" (*Ross v. Kish* (2006) 145 Cal.App.4th 188, 197.) The court must assume the truth of the evidence favorable to the plaintiff and

consider the defendant's opposing evidence only to determine if it defeats the plaintiff's showing as a matter of law. (*Flatley v. Mauro* (2006) 39 Cal.4th 299, 326; *Soukup v. Law Offices of Herbert Hafif* (2006) 39 Cal.4th 260, 291.) Although the court does not weigh the evidence, "it should grant the motion if, as a matter of law, the defendant's evidence supporting the motion defeats the plaintiff's attempt to establish evidentiary support for the claim. [Citation.]" (*Wilson v. Parker, Covert & Chidester, supra,* at p. 821.)

"On appeal, we review the trial court's decision de novo, engaging in the same two-step process to determine, as a matter of law, whether the defendant made its threshold showing the action was a SLAPP suit and whether the plaintiff established a probability of prevailing. [Citation.]" (*Marijanovic v. Gray, York & Duffy* (2006) 137 Cal.App.4th 1262, 1270; accord, *ComputerXpress, Inc. v. Jackson* (2001) 93 Cal.App.4th 993, 999.) We review the trial court's ruling and not its rationale. (*City of Santa Monica v. Stewart* (2005) 126 Cal.App.4th 43, 80.)

II. Ishkanian and Sunset Photo Did Not and Could Establish a Probability of Prevailing.

We address the second prong of the trial court's inquiry first, as it is readily apparent from the record that Ishkanian and Sunset Photo failed to make the evidentiary showing necessary to establish a probability of prevailing. The trial court ruled that they had met their burden solely on the basis of the allegations contained in their verified complaint.[3] Numerous cases, however, have held consistently that a plaintiff must present admissible evidence in order to satisfy his or her burden of establishing a probability of prevailing. The rule, plainly stated by the court in *ComputerXpress v.*

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[3] The trial court turned to the pleadings, in part because it was under the erroneous impression that neither party had submitted evidence in connection with the motion to strike. For reasons that are not clear from the record, the trial court did not consider the declarations appellants submitted in support of the motion.

Jackson, supra, 93 Cal.App.4th at page 1010, is that once the party moving to strike has met its burden to show the complaint alleges acts arising from protected activity, the burden shifts to the plaintiff to make a prima facie showing of facts which, if proven, would support a judgment in the plaintiff's favor. "However, the plaintiff 'cannot simply rely on the allegations in the complaint' [citation], but 'must provide the court with sufficient *evidence* to permit the court to determine whether "there is a probability that the plaintiff will prevail on the claim."'" (*Ibid*.; accord, *Gilbert v. Sykes* (2007) 147 Cal.App.4th 13, 26; *Traditional Cat Assn., Inc. v. Gilbreath* (2004) 118 Cal.App.4th 392, 398; *Tuchscher Development Enterprises, Inc. v. San Diego Unified Port Dist.* (2003) 106 Cal.App.4th 1219, 1237; *DuPont Merck Pharmaceutical Co. v. Superior Court* (2000) 78 Cal.App.4th 562, 568.)

Notably, the court in *Roberts v. Los Angeles County Bar Assn.* (2003) 105 Cal.App.4th 604, 613–614, expressly rejected the notion that a verified complaint may serve as a substitute for admissible evidence, explaining: "In assessing the probability of prevailing, a court looks to the evidence that would be presented at trial, similar to reviewing a motion for summary judgment; a plaintiff cannot simply rely on its pleadings, even if verified, but must adduce competent, admissible evidence." (See also *HMS Capital, Inc. v. Lawyers Title Co.* (2004) 118 Cal.App.4th 204, 212 ["In opposing an anti-SLAPP motion, the plaintiff cannot rely on the allegations of the complaint, but must produce evidence that would be admissible at trial"].)

Ishkanian and Sunset Photo proffered nothing beyond the verified complaint in support of their opposition to the motion to strike. Their failure to present any evidence that would be admissible at trial is fatal to their ability to establish a probability of prevailing. For this reason, we cannot affirm the denial of the motion to strike on the ground that Ishkanian and Sunset Photo established a probability of prevailing. (See *Bernardo v. Planned Parenthood Federation of America* (2004) 115 Cal.App.4th 322, 357 [appellate court may affirm the trial court's decision on a motion to strike under section 425.16 on any theory applicable to the case, regardless of the correctness of the grounds on which the lower court reached its conclusion].) Rather, the outcome of the

motion turns on the first prong of the trial court's inquiry—whether the allegations in the complaint arose from protected activity.

III. The Complaint Arose from Protected Activity.

The trial court summarily ruled "[d]efendants have established that the Complaint contains causes of action against defendants which arise from an act of defendants in furtherance of defendants' right of petition or free speech under the U.S. or CA. Constitution in connection w/a public issue." On the basis of the trial court's citations to two cases in support of its ruling, we infer the court found that appellants' reporting Ishkanian's alleged security breaches to the FBI and media outlets constituted protected activity under section 425.16, subdivisions (e)(1) and (e)(2) as statements made in connection with an "official proceeding authorized by law." (See *Lee v. Fick* (2005) 135 Cal.App.4th 89, 96 [holding that a letter hand delivered to school district seeking a baseball coach's termination was protected activity under § 425.16, subd. (e)(1), because "communications to an official agency intended to induce the agency to initiate action are part of an 'official proceeding'"]; *Dickens v. Provident Life & Accident Ins. Co.* (2004) 117 Cal.App.4th 705, 714 [holding that malicious prosecution action predicated on the claim that the defendants were instrumental in bringing about a criminal prosecution for insurance fraud was subject to an anti-SLAPP motion, as the complaint alleged that the defendants had "contact with the executive branch of government and its investigators about a potential violation of law. The contact was preparatory to commencing an official proceeding authorized by law: a criminal prosecution for mail fraud"].)

We agree that appellants' act of providing information to the FBI that led to the FBI searches was part of an "official proceeding" that likewise arose from protected activity. (See *Chabak v. Monroy* (2007) 154 Cal.App.4th 1502, 1511 [patient's report to police that physical therapist touched her inappropriately was protected activity under section 425.16]; *ComputerXpress, Inc. v. Jackson, supra,* 93 Cal.App.4th at p. 1009 [complaint to Securities and Exchange Commission intended to prompt an investigation constituted protected petitioning activity]; *Dove Audio, supra,* 47 Cal.App.4th at p. 784

[complaint to Attorney General seeking investigation was protected activity as a communication made in connection with an official proceeding].)

While appellants raise no issue with the trial court's conclusion that the entire complaint involved conduct subject to the motion to strike, Ishkanian and Sunset Photo urge that this conclusion was erroneous. We quickly dispose of their first argument that appellants' conduct was not protected because it involved false reports to the FBI which are not constitutionally protected. The court in *DuPont Merck Pharmaceutical Co. v. Superior Court, supra*, 78 Cal.App.4th at page 566 rejected an identical argument, explaining that allegations of falsity are not considered in connection with the question of whether the statements are protected petitioning activity, but rather, are considered as part of the second prong of the analysis whether there is a probability the plaintiffs will prevail. (See also *Fox Searchlight Pictures, Inc. v. Paladino* (2001) 89 Cal.App.4th 294, 305 ["The Legislature did not intend that in order to invoke the special motion to strike the defendant must first establish her actions are constitutionally protected under the First Amendment as a matter of law. If this were the case then the inquiry as to whether the plaintiff has established a probability of success would be superfluous," fn. omitted].)

Nor does the alleged falsity of the report permit Ishkanian and Sunset Photo to rely on the principle "that section 425.16 cannot be invoked by a defendant whose assertedly protected activity is illegal as a matter of law and, for that reason, not protected by constitutional guarantees of free speech and petition." (*Flatley v. Mauro, supra,* 39 Cal.4th at p. 317.) To invoke this principle, the defendant must concede or the evidence must conclusively establish that the conduct complained of was illegal as a matter of law. (*Huntingdon Life Sciences, Inc. v. Stop Huntingdon Animal Cruelty USA, Inc.* (2005) 129 Cal.App.4th 1228, 1246 (*Huntingdon Life Sciences*).) Where, as here, the legality of the exercise of a constitutionally protected right is one of the matters in dispute in the action, a threshold showing of protected activity has been made. (*Governor Gray Davis Com. v. American Taxpayers Alliance* (2002) 102 Cal.App.4th 449, 460.)

We also reject Ishkanian's and Sunset Photo's next argument that not all allegations concerning the FBI investigation are protected by section 425.16. The focus

of their argument is on allegations relating to appellants' reporting the results of their investigation and the occurrence of the FBI searches to newspapers and Web sites. For example, they alleged: "As a result of the DEFENDANTS causing the FBI Raids by providing the FBI with knowingly false information, the Los Angeles Times and numerous other media outlets reported about the FBI Raids and the accusations against JILL ISHKANIAN and SUNSET PHOTO." Elsewhere in the complaint, they similarly alleged on information and belief "that by contacting media sources and providing them with information about the FBI Raids and by providing them with knowingly false information about JILL ISHKANIAN and SUNSET PHOTO, [appellants] had the specific intent to create negative publicity about the FBI Raids and JILL ISHKANIAN and SUNSET PHOTO with the specific goal of hurting JILL ISHKANIAN personally, causing mental distress to JILL ISHKANIAN personally and ruining JILL ISHKANIAN's and SUNSET PHOTO's businesses and business opportunities."

Section 425.16, subdivision (e)(2), provides that such activity is subject to a motion to strike as "any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law." Illustrating the application of this provision, the court in *Annette F. v. Sharon S.* (2004) 119 Cal.App.4th 1146, 1161, held that the plaintiff's sending a letter to a newspaper which contained allegations about the defendant's domestic violence and abuse was a statement made in connection with an official proceeding because the allegations were at issue in a pending adoption and writ proceeding. (See also *Maranatha Corrections, LLC v. Department of Corrections & Rehabilitation* (2008) 158 Cal.App.4th 1075, 1085 [the defendants' providing to local newspapers a letter accusing a state agency of misappropriation and conspiracy was a statement made in connection with an issue under consideration by an executive body]; *Braun v. Chronicle Publishing Co.* (1997) 52 Cal.App.4th 1036, 1048–1049 [newspaper articles reporting on an investigative audit were made in connection with an issue under consideration in official proceeding]; *Dove Audio, supra*, 47 Cal.App.4th at p. 784 [the defendants' sending a letter which raised the issue of whether charities were receiving

designated funds was a communication made in connection with an official proceeding—a proposed complaint to the Attorney General seeking an investigation].) Here, allegations concerning appellants' communicating information about the FBI investigation to media outlets likewise constituted protected activity as communications made in connection with an official proceeding. As aptly noted in *Dove Audio, supra,* at page 784, "[t]he fact that the communication was made to other private citizens rather than to the official agency does not exclude it from the shelter of the anti-SLAPP suit statute."

Ishkanian's and Sunset Photo's final argument is that their complaint was not only premised on appellants' reports to and about the FBI investigation, but also involved other allegations not within the purview of section 425.16. Causes of action containing allegations of protected and unprotected activity are commonly referred to as "mixed," and in those instances, the protections of section 425.16 apply "'unless the protected conduct is "merely incidental" to the unprotected conduct.' [Citations.]" (*Peregrine Funding, Inc. v. Sheppard Mullin Richter & Hampton LLP* (2005) 133 Cal.App.4th 658, 672; accord, *Salma v. Capon* (2008) 161 Cal.App.4th 1275, 1287 ["A mixed cause of action is subject to section 425.16 if at least one of the underlying acts is protected conduct, unless the allegations of protected conduct are merely incidental to the unprotected activity"]; see also *Fox Searchlight Pictures, Inc. v. Paladino, supra,* 89 Cal.App.4th at p. 308 ["a plaintiff cannot frustrate the purposes of the SLAPP statute through a pleading tactic of combining allegations of protected and nonprotected activity under the label of one 'cause of action'"].) In analyzing whether the protections of section 425.16 apply to a mixed cause of action, "[t]he anti-SLAPP statute's definitional focus is not the form of the plaintiff's cause of action but, rather, the defendant's *activity* that gives rise to his or her asserted liability—and whether that activity constitutes protected speech or petitioning." (*Navellier v. Sletten* (2002) 29 Cal.4th 82, 92.)

When the relevant factual allegations of the complaint are considered in context, the only reasonable conclusion to be drawn is that appellants' reports to and about the FBI investigation and searches are what give rise to liability. That Ishkanian and Sunset

Photo alleged that appellants engaged in additional activity purporting to give rise to liability is of no consequence. For example, in *Huntingdon Life Sciences, supra,* 129 Cal.App.4th 1228, the court found that a complaint alleging multiple tort claims arising from the defendants' conducting protests at the plaintiff's home and publishing her home address arose from protected activity. It reached this conclusion even though each cause of action in that case included an allegation that the defendants vandalized the plaintiff's home. Explaining why that allegation did not remove the complaint from the purview of section 425.16, the court stated: "Vandalism, of course, is not a legitimate exercise of free speech rights, and if the complaint arose only from such conduct it would not be subject to an anti-SLAPP motion. Each cause of action, however, also alleges protected activity such as [the defendants'] encouragement of demonstrations against animal testing and support of 'those who choose to operate outside the confines of the legal system.' Indeed, the gravamen of the action against defendants here is based on their exercise of First Amendment rights." (*Huntingdon Life Sciences, supra,* at p. 1245.)

Similarly, the underlying act of appellants' reporting Ishkanian and Sunset Photo to the FBI was the gravamen of each of the eight tort causes of action alleged in the complaint. The third cause of action for negligence, the seventh cause of action for slander and the eighth cause of action for libel cannot be considered mixed causes of action, as they were premised entirely on appellants' reporting the results of their investigation to the FBI and their reporting the FBI investigation to media sources. Likewise, notwithstanding the broad allegations of "intentional, outrageous, [and] malicious" conduct supporting the first cause of action for intentional infliction of emotional distress, the injuries allegedly suffered as a result of that conduct related solely to the effect of appellants' report to the FBI. Finally, the second cause of action for negligent infliction of emotional distress was not a mixed cause of action, as the duty appellants allegedly owed was "a duty of reasonable care to JILL ISHKANIAN prior to their complaining to and or causing others to complain to the FBI about JILL ISHAKANIAN." Further, appellants allegedly breached that duty by failing to investigate Ishkanian's security breaches before reporting them to the FBI and "by

knowingly making false statements to the FBI and media outlets about JILL ISHKANIAN and by causing others to make knowingly false statements about JILL ISHKANIAN to the FBI and media outlets."

The fourth cause of action for negligent training and retention of employees alleged that Wenner Media knew or should have known that appellants Baker, Jane Wenner and Janice Min were "incompetent and unfit to perform the duties for which they were employed," and that Wenner Media's failure "to adequately train and supervise [them] was the proximate cause of Defendants' Policy and Scheme to Destroy Plaintiff as well as the proximate cause of injuries suffered by JILL ISHKANIAN." But despite this claim's seeming focus on inadequate training and supervision, the balance of the allegations in the fourth cause of action confirm that the reports to the FBI were more than incidental to the claim. Ishkanian and Sunset Photo alleged: "Had defendant WENNER MEDIA properly trained Defendants WENNER, BAKER and MIN in the proper manner of treatment of former employees who became competitors of or did business with competitors of Us WEEKLY, then Defendants' Policy and Scheme to Destroy Plaintiffs would not have occurred or been implemented, the FBI Raids would not have happened and damages to JILL ISHKANIAN would not have been suffered." Ishkanian's and Sunset Photo's attempt to avoid the reach of section 425.16 by characterizing their complaint about a report to a federal agency as a claim for negligent training and retention is precisely what the court cautioned against in *Ramona Unified School Dist. v. Tsiknas* (2005) 135 Cal.App.4th 510, 519, when it observed that "a plaintiff cannot avoid operation of the anti-SLAPP statute by attempting, through artifices of pleading, to characterize an action as a *garden variety* tort claim when in fact the liability claim is predicated on protected speech or conduct. [Citation.]" The court concluded that "when the allegations referring to arguably unprotected activity are only incidental to a cause of action based essentially on protected activity, collateral references to unprotected activity should not obviate application of the anti-SLAPP statute to the complaint. [Citation.]" (*Id.* at p. 520.)

Finally, the ninth cause of action for intentional interference with prospective economic advantage and the tenth cause of action for conspiracy alleged that appellants interfered and conspired not only by making false accusations to the FBI and causing members of the media to publish stories about the FBI searches, but also by "telling people Plaintiffs' business enterprise would fail" and "by going to and attempting to recruit JILL ISHKANIAN's news sources and asking them not to provide news information to Plaintiffs." As explained earlier, so long as the allegations of protected conduct are not merely incidental to the unprotected activity, the cause of action is subject to a motion to strike. (*Salma v. Capon, supra,* 161 Cal.App.4th at p. 1287; *Peregrine Funding, Inc. v. Sheppard Mullin Richter & Hampton LLP, supra,* 133 Cal.App.4th at p. 672.) The allegations here are similar to those in *Salma v. Capon*, where the court held that an intentional interference claim premised on both protected activity (filing notices of lis pendens, filing a lawsuit and communicating with municipal departments) and nonprotected activity (the defendant's moving back into the disputed property without permission) was subject to a motion to strike, because the claim "was based in part on protected activity that was not merely incidental to allegations of unprotected conduct . . . ." (*Salma v. Capon, supra,* at p. 1288.) Ishkanian's and Sunset Photo's allegations of protected activity were not merely incidental or collateral to their allegations of nonprotected activity, but rather, were a significant component of both their liability and damages allegations. Accordingly, the entire ninth and tenth causes of action were subject to strike under section 425.16.

Because appellants met their burden to show that the complaint arose from protected activity and Ishkanian and Sunset Photo failed to meet their burden to establish a probability of prevailing on the complaint, the motion to strike should have been granted. (See *City of Santa Monica v. Stewart, supra,* 126 Cal.App.4th at p. 79.)

DISPOSITION

The order denying the motion to strike is reversed. The matter is remanded and the trial court is directed to enter a new order granting the motion. Appellants are entitled to their costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, Acting P. J.

DOI TODD

We concur:

_____, J.

ASHMANN-GERST

_____, J.

CHAVEZ